

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
1:17-cv-274-MOC
(1:15-cr-41-MOC-DLH-1)**

GILBERTO RODRIGUEZ,)	
)	
Petitioner,)	
)	
vs.)	ORDER
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	
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THIS MATTER is before the Court on Petitioner’s Motion under 28, United States Code, Section 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. (Doc. No. 1).

Petitioner moves to vacate his conviction and sentence under 28 U.S.C. § 2255, arguing, in part, that his trial counsel failed to file a notice of appeal despite his request that counsel file a notice of appeal on his behalf. The Government filed a Response on December 18, 2017, conceding that this Court should grant Petitioner’s motion to vacate in part; enter an amended judgment permitting Petition to file a timely notice of appeal; and dismiss Petitioner’s remaining claims without prejudice. (Doc. No. 3).

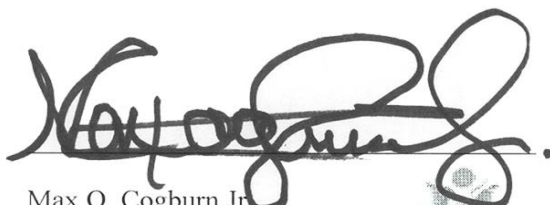
The Court agrees with the Government that the Court’s resources would best be served by granting the motion to vacate to the extent that Petitioner brings a claim for ineffective assistance of counsel based on counsel’s failure to file a notice of appeal on Petitioner’s behalf after Petitioner instructed him to do so. The Court will, therefore, vacate the original judgment and enter a new judgment from which an appeal may be taken, and the Court will dismiss

Petitioner's remaining claims without prejudice.

IT IS, THEREFORE, ORDERED that:

1. For the reasons stated herein, the Court **GRANTS** Petitioner's Motion to Vacate with respect to his claim for ineffective assistance of counsel based on counsel's failure to file a notice of appeal on Petitioner's behalf. Petitioner's remaining claims are dismissed without prejudice to Petitioner to refile the petition after the Fourth Circuit has adjudicated Petitioner's appeal.
2. The Clerk shall amend the judgment consistent with this Order, so that Petitioner may file a Notice of Appeal to the Fourth Circuit Court of Appeals.
3. Petitioner is hereby advised that he has the right to appeal his criminal case to the United States Fourth Circuit Court of Appeals. Should Petitioner choose to appeal, he must file a Notice of Appeal with the Clerk of Court for the United States District Court for the Western District of North Carolina within 14 (fourteen) calendar days after the date the Amended Judgment of conviction is filed or within 14 (fourteen) calendar days after any government appeal is filed, whichever is later. FED. R. APP. P. 4(b)(1)(A).

Signed: December 19, 2017



Max O. Cogburn Jr.
United States District Judge